Supreme Court, U.S.
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No. 90-1189

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1990

TROJAN TECHNOLOGIES, INC.,
et al.,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
and ERNEST D. PREATE, JR.
ATTORNEY GENERAL,

Respondents

On Petition for Certiorari to
the United States Court of
Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state that controls the purchasing decisions of its local agencies through a "buy-American" law is a market participant, rather than a market regulator, and as such is not subject to the restraints of the Commerce Clause?

2. Whether the market participant doctrine protects government purchasing decisions that affect foreign, as opposed to interstate, commerce?

3. Whether "buy-American" laws serve a legitimate state interest for purposes of the Equal Protection Clause?

LIST OF PARTIES

The parties listed in the caption to the petition for certiorari are accurate, except that respondent LeRoy S. Zimmerman, the Attorney General of Pennsylvania, has been succeeded in that office by Ernest D. Preate, Jr., who should be substituted for him. Sup. Ct. Rule 35.3.

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JURISDICTIONAL STATEMENT

The Court lacks jurisdiction over the respondent Commonwealth of Pennsylvania by virtue of the Eleventh Amendment to the Constitution. E.g., Alabama v. Pugh, 438 U.S. 781 (1978)(per curiam). While the Commonwealth did not assert its immunity in the District Court or the Court of Appeals, it may properly do so now. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-67 (1945). The Eleventh Amendment does not affect the Court's jurisdiction over the other respondent, Attorney General Preate of Pennsylvania. Ex parte Young, 209 U.S. 123 (1908).

In all other respects, the respondents accept the petitioners' jurisdictional statement.

STATEMENT OF THE CASE

Pennsylvania's Steel Products Procurement Act, Pa. Stat. Ann. tit. 73, §§1881-1887 (Purdon 1990 Supp.), requires all public agencies, both state and local, to use American-made steel in their public works projects. The petitioners, a Canadian corporation and its American representative, Pet. App. 4a, claim that the statute is unconstitutional.

1. Petitioner Trojan Technologies, Inc. is a Canadian corporation that manufactures an ultraviolet water-disinfectant system known as the "UV-2000." Ibid. Several Pennsylvania agencies have purchased the UV-2000, and in July of 1988 the Pennsylvania Attorney General's Office sent letters to them, and to Trojan, requesting documentation that the UV-2000 complies with the Steel Products Act.

Ibid. Trojan has not supplied this information, and the Attorney General's Office has not yet determined whether the Steel Products Act has been violated. Pet. App. 4a-5a.

2. In the meantime, the petitioners filed this action, seeking declaratory and injunctive relief against the Commonwealth and the Attorney General. In the District Court, the petitioners claimed that the Steel Products Act a) violated the Commerce Clause, b) interfered with the federal government's power to conduct foreign relations, c) was preempted by various federal statutes and executive agreements and d) was void for vagueness. Pet. App. 31a-33a. On cross motions for summary judgment, the District Court rejected all of these claims and granted judgment to the respondents. Pet. App. 30a-40a. Petitioners appealed.

3. a. In the Court of Appeals, and at that court's invitation, the United States submitted a brief as amicus curiae, addressing the petitioners' Commerce Clause, preemption, and foreign affairs claims. Pet. App. 5a. On each of these issues, the United States argued that Pennsylvania's statute is constitutional. Among other matters, the United States advised the Court of Appeals that

> State and local government procurement policies in general, as well as restrictions on steel products in particular, are presently the subject of international negotiations....
>
> ....
>
> In the current climate of negotiations, the existence of state Buy-American laws in the United States does not interfere with our negotiators' consideration of whether to remove sub-national procurement barriers on an international basis. Such barriers are a common feature of the international scene. If U.S. negotiators reach an agreement to remove these barriers, such an

> agreement would, of course, pre-empt any conflicting state or local laws or regulations. (Citations omitted.) But until that occurs, the existence of such laws does not interfere in any way with the conduct of foreign trade policy.

Brief for the United States as Amicus Curiae, p. 18-20 (filed July 18, 1990).

b. The Court of Appeals affirmed the District Court's judgment. Turning first to the petitioners' preemption arguments, Pet. App. 5a-14a, the Court of Appeals held that the web of federal statutes and international agreements cited by the petitioners "do not constitute a comprehensive scheme so pervasive that it must exclude all state action." Pet. App. 14a. To the contrary, the federal government appeared to the Court of Appeals to have adopted "an explicit negotiating strategy" that permits state buy-American laws "pending sufficient trade concessions or

assurances of mutuality on the part of our international trading partners." Ibid.

On the Commerce Clause issue, the Court of Appeals agreed that the respondents were protected by the "market participant" doctrine: "a state or state subdivision that acts as a market participant rather than a market regulator 'is not subject to the restraints of the Commerce Clause.'" Pet. App. 15a, quoting White v. Massachusetts Council of Constr. Employees, Inc., 460 U.S. 204, 208 (1983). The Court of Appeals rejected the idea that Pennsylvania, in controlling the purchases of local agencies, was not acting as a market participant, and declined to follow a Seventh Circuit decision to that effect. Pet. App.

16a-20a, disagreeing with W.C.M. Window Co. v. Bernardi, 730 F.2d 486 (7th Cor. 1984).

The Court of Appeals recognized that statutes affecting foreign commerce may be subject to a more demanding scrutiny than those that affect only interstate commerce, and recognized as well that this Court has reserved decision on the validity of state buy-American laws. Pet. App. 20a-21a, citing Reeves, Inc. v. Stake, 447 U.S. 429, 437 n. 9. (1980). The court held, however, that Pennsylvania's statute "survives even the most searching review," Pet. App. 21a, and accordingly held that it does not violate the Commerce Clause.

Finally, the Court of Appeals considered and rejected the petitioners' claim that the statute violates the Equal Protection Clause. [1] Pet. App. 28a-29a. The petitioners had relied exclusively on Metropolitan Life Insurance Co. v. Ward, 470 U.S. 689 (1985)(striking down an Alabama statute discriminating against out-of-state insurance companies). The Court of Appeals, however, noted that Metropolitan Life had been "sharply limited to its facts," Pet. App. 29a, in Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159 (1985)(upholding a Massachusetts statute discriminating against non-New England banks) and considered it inapplicable here.

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[1] The Court of Appeals also held that the Steel Products Act does not interfere with the federal government's foreign affairs power, Pet. App. 22a-24a, and that it is not void for vagueness. Pet. App. 24a-28a. Petitioners do not press these claims in this Court.

REASONS FOR DENYING THE WRIT

I. IT WOULD BE PREMATURE FOR THE COURT TO DECIDE WHETHER THE "MARKET PARTICIPANT" DOCTRINE PROTECTS STATES WHEN THEY CONTROL THE PURCHASING DECISIONS OF THEIR LOCAL AGENCIES.

The Court in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), held that when a governmental body engages in a commercial transaction--i.e., when it is a "market participant"--it is not subject to the restraints which the Commerce Clause imposes upon its activities when it acts as a market regulator. The narrow issue presented by this case is whether a state is a market participant when it acts, by statute, to control the purchasing decisions of state-created local agencies. This issue, however, has received virtually no prior attention in the lower courts and is, we submit, not yet ripe for this Court's review.

In the fifteen years since Hughes was decided, only one other court has reached this narrow issue. See W.C.M. Window Co. v. Bernardi, 730 F.2d 486 (7th Cir. 1984). It is true that the Third Circuit in this case declined to follow Bernardi, Pet. App. 17a-19a, but it is also true that the Seventh Circuit in Bernardi disposed of this issue perfunctorily, with little real analysis.[2] The Seventh Circuit did not, of course, have the benefit of the Third Circuit's reasoning in this case, which is to date the only detailed analysis of the issue.

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2 Most of the Seventh Circuit's discussion in Bernardi was devoted to establishing that the market participant issue was not foreclosed by prior decisions of this Court, and was therefore open to the Seventh Circuit to decide. Id., 730 F.2d at 494-95. Its actual discussion of the issue itself comprises only a single conclusory paragraph. Id., 730 F.2d at 496.

It would therefore be premature for the Court to step in to settle a "conflict" which further events may show was illusory. In any event, an issue that arises only twice in fifteen years, and then in cases over six years apart, is hardly one that cries out for the Court's immmediate attention. To the extent that it continues to arise at all, this issue will benefit from further seasoning in the lower courts.

II. THE ISSUE OF WHETHER STATE BUY-AMERICAN LAWS VIOLATE THE FOREIGN COMMERCE CLAUSE HAS BEEN DORMANT FOR OVER A DECADE, AND DOES NOT MERIT REVIEW BY THE COURT.

In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), the Court reserved the question of whether state buy-American laws violate the Foreign Commerce Clause. Id., 447 U.S. at 437 n. 9. Since Reeves, however, the issue has

apparently lain dormant. The petitioners not only point to no decision that conflicts with the Third Circuit's holding in this case, they point to no decision, in the eleven years since Reeves, that addresses the issue at all, and the respondents know of none. The issue thus scarcely seems to be a pressing one.

The petitioners, however, rely on the supposed need to maintain what they call a "uniform federal policy with respect to the importation of foreign steel," Pet. 17, and to prevent local interference in our international trade relations. Pet. 18. This asserted need for uniformity and federal supremacy--which is really just a restatment of the petitioners' discredited preemption arguments, see Pet. App. 5a-14a--is belied by the

contrary position taken by the United States in its amicus curiae brief to the Court of Appeals. Supra at 4-5; Pet. App. 5a & n. The policies and interests of the federal government in the area of international trade are, we submit, more likely to be correctly identified by the United States itself than by a foreign manufacturer.

As the Court of Appeals recognized, the United States is concerned "with achieving [the] reciplocal...reduction" of trade barriers such as the Steel Products Act. Pet. App. 10a (emphasis in original). It is odd indeed for petitioners to take the position that the national interest requires their unilateral reduction.

III. THE PETITIONERS' EQUAL PROTECTION CLAIM WAS PROPERLY RESOLVED BY THE ROUTINE APPLICATION OF ESTABLISHED PRINCIPLES.

The petitioners present for the Court's review what is, in reality, a common or garden equal protection challenge to state economic legislation. The correct analysis is well-settled: is the legislation, or is it not, rationally related to furthering a legitimate state interest? The petitioners cannot pretend that the Court of Appeals did not apply the correct legal principles to their claim, see Pet. App. 28a-29a; they simply disagree with the outcome. Disagreements over the application of well-settled legal principles to specific cases, however, do not merit the Court's discretionary review.

CONCLUSION

For these reasons, the respondents ask the Court to deny the writ of certiorari.

Respectfully submitted,

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